

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of

Petition of Wireless Consumers Alliance *et al.*
for a Declaratory Ruling Regarding
Cellphone 911 Requirements in Response to
Referral from the United States District Court
for the Northern District of Illinois

) WT Docket No. 99-328
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TO: The Secretary, Federal Communications Commission

PETITION FOR DECLARATORY RULING

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Dated: October 3, 2003

SUMMARY

Petitioners Wireless Consumers Alliance (“WCA”), Lisa Bass, Stephen J. Hubbard, Alysa Liff, Jed Becker, Charles Fasano, Donna Clarke, Julie McMurry, Armando Lage, Vishal Aggarwal and Bridget Byrne submit this Petition for Declaratory Relief pursuant to §1.2 of the Commission’s Rules. Petitioners are plaintiffs in multidistrict litigation currently pending in the United States District Court for the Northern District of Illinois before the Honorable John F. Grady (the “Litigation”).¹ In the Litigation, Petitioners contend that certain cellphone manufacturers and carriers named as Defendants in the Litigation (hereinafter, “Defendants”) have failed to comply with rules that the Commission adopted² to protect the safety of cellphone callers – rules that were enacted to combat a phenomenon known as “lock-in” when a 911 call is made from a cellphone operating in analog mode. The Rules in question provide, *inter alia*, that if the preferred carrier has not *successfully delivered the call to the landline carrier* within 17 seconds after the call is placed, the handset must seek to complete the call with the non-preferred cellular carrier. *Id.* at ¶41 (the “17 Second Rule”).³

Under the doctrine of primary jurisdiction, the Court issued an Order in the Litigation on September 3, 2003 (the “September 3 Order”) referring certain questions to the Commission regarding the interpretation of the 17 Second Rule. The Court has asked the Commission:

...what is meant by “call completion,” [what is meant by] “delivery of the call to the landline carrier,” and exactly what action must be performed by the handset in 17 seconds.⁴

¹ The Litigation bears the caption, *In re Wireless Telephone 911 Calls Litigation*, M.D.L. 1521, No. 03-CV-2597.

² The Rules were announced in the *Second Report and Order* in its *Enhanced 911 Emergency Calling Systems* rulemaking, CC Docket No. 94-102, 14 F.C.C.R. 10954 (June 9, 1999) (hereinafter, the “*Second Report and Order*”).

³ The *Second Report and Order* alternatively describes what must be accomplished within 17 seconds as either delivery to the landline carrier or receipt of the voice signal by the base station. *Id.* at ¶41 & n. 52. However, there is no substantive difference between these two formulations because, upon receipt of the signal by the base station, it is conveyed to the landline carrier virtually instantaneously. The *Second Report and Order* therefore uses the terms “delivery to the landline carrier” and “receipt by the base station” as interchangeable.

⁴ September 3 Order, attached hereto as Exhibit A, at p. 7.

The Court referred these questions to the Commission to resolve a dispute between plaintiffs and defendants in the Litigation. Defendants in the Litigation assert that under ¶41 of the *Second Report and Order*, the only thing their handsets are required to accomplish within 17 seconds is *the assignment of a voice channel*. Plaintiffs in the Litigation – Petitioners here – contend, on the other hand, that what must be accomplished within 17 seconds under the *Second Report and Order* is not merely the assignment of a voice channel but, rather, the receipt of the call at the base station and its delivery to the landline carrier. As the *Second Report and Order* states:

After a handset receives a voice channel assignment and begins transmission to a base station on that channel, Conversation State is reached. As noted, however, at this stage, the handset's voice channel transmission has not necessarily been received at the base station, and thus the handset may not necessarily be able to use the voice channel to communicate with the base station (and thence with the landline network). In establishing a time limit for delivering the call to the landline carrier, we are seeking to ensure that communication between the handset and base station on the voice channel goes beyond Conversation State and reaches the point where the handset's voice channel transmission is indeed received at the base station.⁵

Petitioners request the Commission to issue a declaratory ruling⁶ responding to the questions raised in the Court's referral, and to do so on or before December 3, 2003, the date of the next scheduled Status Conference in the Litigation. More specifically, Petitioners request the Commission to inform the Court that the 17 Second Rule requires cellphones to switch to a competitor's system "if the preferred carrier has not successfully delivered the call *to the landline carrier* within 17 seconds after the call is placed...",⁷ and that merely providing a voice channel assignment within 17 seconds does not satisfy the requirements of the Commission's rules.

⁵ *Second Report and Order*, at n.52.

⁶ *In the Matter of Hi-Tech Furnace Systems, Inc.*, 14 F.C.C.R. 8040, 8043 n.24, 1999 FCC LEXIS 1672 at **8, 15 Comm. Reg. (P&F) 795 (1999), *aff'd on other grds*, 224 F.3d 781 (D.C. Cir. 2000) (A petition for declaratory relief under §1.2 is the procedurally appropriate way to bring a matter referred under the doctrine of primary jurisdiction before the Commission where, as here, the court retains jurisdiction to determine the final outcome of the proceeding.)

⁷ *Second Report and Order*, ¶41 (emphasis added).

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FACTUAL AND PROCEDURAL BACKGROUND

In the *Second Report and Order* in its *Enhanced 911 Emergency Calling Systems Docket* (the “*E911 Docket*”), the Commission adopted rules governing the manner in which emergency 911 calls were to be processed by cellular telephones. Petitioner WCA’s predecessor in interest, the Ad Hoc Consumer Alliance for Public Access to 911 (the “Alliance”), actively participated in the rulemaking that led to the Commission’s issuance of the *Second Report and Order* and was instrumental in pressing for the adoption of the 17 Second Rule. The Commission found that due to “blank spots” or gaps in coverage by cellphone carriers, many emergency 911 calls, especially those made by portable, handheld cellphones from rural or suburban areas, were not being completed. *Second Report and Order*, ¶¶14, 30. Indeed, the record before the Commission detailed specific incidents in which individuals had died because their wireless 911 calls failed to go through. *Id.* at n. 29.

The Commission cited evidence that as many as 34% of calls made from portable phones in rural areas and 25 % of such calls in suburban areas were not being connected (*Id.*, ¶15). The Commission observed that rural areas were where cellular 911 calls were most valuable and improvements in call completion were most needed, because drivers are far more likely to suffer a fatal crash in a rural area as in a city, and because response time in rural areas is considerably slower than in more populated areas. *Id.*, ¶¶17-18.

The Commission also identified a troublesome phenomenon known as “lock-in,” which occurs when the cellphone handset receives a voice channel assignment from the base station but the signal between the phone and the base station over the voice channel is too weak to establish or maintain voice communications. *Id.* at ¶16. The Commission observed:

Under those circumstances the handset would be unable to complete the 911 call to the preferred carrier, yet also prevented from switching to the other [competitor’s] system even if the handset has the capability to contact that carrier...

Second Report and Order, ¶16.

In light of these and other concerns, the Commission determined that 911 call completion difficulties represented “a significant public safety problem” (*Id.* at ¶17) and instructed the cellphone industry to establish a separate procedure to handle emergency calls. The *Second Report and Order* required the industry to adopt one of three approved call processing procedures. The industry adopted the “A/B – Intelligent Retry,” or “A/B-IR” method, under which handsets would initially attempt to complete the call on the preferred carrier’s system up to three times and then, if the call could not be so completed, would try to complete it using the facilities of the non-preferred carrier. *Second Report and Order*, ¶¶33.

The Commission found that the A/B-IR method would improve 911 call completion. *Id.*, ¶34. However, the Alliance pointed out, and the Commission explicitly recognized, that additional safeguards were necessary to ensure that A/B-IR would actually achieve the Commission’s goals.

- First, the Alliance asserted, and the Commission agreed, that under the A/B-IR method, if it were to be adopted without alteration or conditions, the initial access efforts on the preferred carrier’s facilities might consume so much time – especially if the handset made three sequential attempts to obtain access on the preferred frequencies before trying non-preferred frequencies – that the ensuing long delays of potentially as much as *48 seconds* “could lead callers to terminate 911 calls that eventually would have been connected.” *Id.*, ¶40. Delays of this magnitude, the Commission observed, would, in effect, be a form of “lock-in.” *Id.*, ¶37. Indeed, the Commission cited to evidence introduced by the Alliance showing the usual time to connect a wireless call is from 4 to 6 seconds, and that 10 to 15 seconds is the maximum length of time most callers will wait for a connection. *Id.*

- Furthermore, the Alliance noted, and the Commission concurred, that as proposed, the A/B-IR method

... treats a call as completed when the handset is in what is termed “Conversation State.” However, at this stage the handset has not necessarily been connected with the wireless carrier or the 911 PSAP [Public Safety Answering Points].

Second Report and Order, ¶36. In other words, the A/B-IR method, as proposed, treated a call as having been completed when a voice channel had been assigned but the handset's voice channel transmission had not been received at the base station. *Id.*, n. 52. Under such circumstances, the Commission observed, the caller and the 911 operator would not be able to communicate with each other. *Id.* Such a result, the Commission observed, would be directly contrary to the purpose of the rules, which was to make sure that if a wireless 911 call failed to go through on the preferred carrier's system, the handset would try to connect it on the facilities of a non-preferred carrier. As the Commission recognized, treating a call as "completed" when the caller could not communicate with anyone would defeat the purpose of the rules and would do nothing to address the perils that the rules were designed to protect against..

Accordingly, to address these problems, the Commission allowed cellphone carriers and manufacturers to employ the A/B-IR method *only* if they complied with two conditions to combat "lock-in":

(1) **The "Effective Feedback" Rule.** The Commission required cellphone handsets to provide "effective feedback," in either visible or audible form, "to inform the user when 911 call processing is underway and has not finished." *Second Report and Order* at ¶39; and

(2) **The 17-Second Rule.** Furthermore, Commission directed that "if the preferred carrier has not successfully delivered the call *to the landline carrier* within 17 seconds after the call is placed," the cellphone must automatically retry the call on a competitor's system. *Id.* at ¶41 (emphasis added).

The Commission stated that it believed its actions would

...have a significant positive impact on the security and safety of analog cellular subscribers, especially in rural and suburban areas, and result in the successful completion of significantly more wireless calls to 911 than occurs today. In this way, we are responding to an important public safety concern: the need for confidence that wireless calls to 911 will in fact go through.

Second Report and Order, ¶1.

Following the issuance of the *Second Report and Order*, Nokia, Ericsson and (with respect to a small number of cellphones) Motorola requested and obtained permission from the Commission to adopt procedures that varied in certain respects from the precise terms of the A/B-IR protocol discussed in the *Second Report and Order*.⁸ However, nothing in any of these orders modified or waived either the Effective Feedback Rule or the 17-Second Rule for these manufacturers. Thus, Nokia, Ericsson and Motorola continue to be subject to the Effective Feedback Rule and the 17-Second Rule, just the same as other industry participants.

THE PENDING LITIGATION AND THE COURT'S REFERRAL

The cellphone industry's response to the Commission's rules was to ignore them. Thus, recent laboratory tests of a significant sample of cellphones made by large cellphone manufacturers demonstrated that *all of the tested phones failed to comply with either the Effective Feedback Rule, the 17-Second Rule or both*.⁹

WCA and additional Petitioners Lisa Bass, Stephen J. Hubbard, Alysa Liff, Jed Becker, Charles Fasano, Donna Clarke, Julie McMurry, Armando Lage, Vishal Aggarwal and Bridget Byrne, who are cellphone users, were concerned that as a result of the industry's refusal to comply with the Commission's rules, cellphone callers nationally remained exposed to the same

⁸ See *Nokia Order*, *Ericsson Order*, *Motorola Order*, attached hereto as Exhibit B.

⁹ See *Declaration and Expert Report on Samsung Cell Phone Non-Compliance with 47 C.F.R. § 22.921* By Robert G. Zicke; *Declaration and Expert Report on Kyocera Cell Phone Non-Compliance with 47 C.F.R. § 22.921* By Robert G. Zicker; *Declaration and Expert Report on Sanyo Cell Phone Non-Compliance with 47 C.F.R. § 22.921* By Robert G. Zicker; *Declaration and Expert Report on LG Cell Phone Non-Compliance with 47 C.F.R. § 22.921* By Robert G. Zicker; *Declaration and Expert Report on Motorola Cell Phone Non-Compliance with 47 C.F.R. § 22.921* By Robert G. Zicker; *Declaration and Expert Report on Nokia Cell Phone Non-Compliance with 47 C.F.R. § 22.921* By Robert G. Zicker, attached hereto as Exhibit C.

risks that the Commission had recognized and attempted to remedy in the *Second Report and Order*, including "lock-in." Petitioners accordingly filed lawsuits in federal and state courts throughout the United States against the principal cellphone manufacturers and carriers¹⁰ seeking relief under 47 U.S.C. §401(b) and other provisions of law for the defendants' failure to comply with the Effective Feedback Rule and the 17 Second Rule. Those actions have now been consolidated in the United States District Court for the Northern District of Illinois before District Judge John F. Grady.¹¹

Defendants in the lawsuits *concede* that their cellphones do not switch to a competitor's system when a 911 call fails to connect to the landline carrier within 17 seconds. However, they contend that the *Second Report and Order* and the Commission's Rules do not require that they do so. Rather, they assert that the *Second Report and Order* requires calls to be switched to the competitor's system only if they fail to achieve a *voice channel assignment* within 17 seconds.¹² According to Defendants, as long as their systems assign a voice channel within 17 seconds, they are in compliance with the 17 Second Rule.

¹⁰ See Complaints attached hereto as Exhibit D. Defendants in the Litigation include Motorola, Inc., Sony Ericsson Mobile Communications, Inc., LG Electronics Alabama, Inc., LG Electronics USA, Inc., Kyocera Wireless Corp., Toshiba America, Inc., Toshiba America Consumer Products, Inc., AT&T Wireless Services, Inc., Sanyo Fisher Co., Sanyo Fisher North America Corp., Matsushita Electric Corp. of America, Sprint Spectrum L.P. d/b/a Sprint PCS, Sprint Corporation, Samsung Electronics America, Inc., Samsung Electronics Co., Ltd., Samsung Telecommunications America, Audiovox Communications Corp., Audiovox Corp., Nokia Corp. and Nokia Inc. *Id.* Claims were also initially brought against Cingular Wireless LLP, but those claims have now been voluntarily dismissed.

¹¹ See *M.D.L. Order*, attached hereto as Exhibit E.

¹² See *Defendants' Joint Motion to Stay Pursuant to the Doctrine of Primary Jurisdiction*, attached hereto as Exhibit F, at 10. In so arguing, defendants have attempted to make deceptive use of a letter from the Commission staff. *Id.* Defendants cite the letter for the proposition that a system that provides a voice channel assignment within 17 seconds is in compliance with the Commission's rules. All that the letter says, however, is that a system that *fails* to provide a voice channel assignment within 17 seconds and does not thereupon begin to search non-preferred frequencies *is not* in compliance with the rules. By over-reading the staff letter, defendants not only have been less than candid with the Court but also have impugned the Commission staff by attributing to its letter a meaning that is directly at odds with the Commission's rules. In any event, a letter from the staff cannot repeal, contradict or modify rules adopted by the Commission. See *Jelks v. FCC*, 146 F.3d 878, 881 (D. D.C. 1998) ("a subordinate body like the [FCC's Video Services] Division cannot alter a policy set by the Commission itself."), *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) (decisions of FCC bureau are from a subordinate body of the Commission and are not

In light of the disagreement between the parties over the meaning of the 17 Second Rule, the Court decided to invoke the doctrine of primary jurisdiction and ask the Commission to determine which side is correct on this issue.¹³ The Court agreed with Plaintiffs that the principal language of the *Second Report and Order* that addresses the 17 Second Rule is found at ¶41 and n. 52 of the *Second Report and Order*. However, the Court stated that it could not determine with clarity from that language “exactly what act must be performed by the handset within 17 seconds.” The Court stated:

True, the *Second Report and Order* states that the handset should switch to the non-preferred carrier “if the preferred cellular carrier has not successfully delivered the call to the landline carrier within 17 seconds after the call is placed.” But, given the complexity of the cellular call set-up, what is meant by the “delivery” of the call to the landline carrier?

September 3 Order at 6.¹⁴ The Court found that the answer to this question lay outside its conventional expertise but was within the Commission’s field of expertise. The Court concluded that judicial economy would be best served by asking the Commission to resolve the issue. *Id.*

The Court therefore directed the parties to proceed to present its questions to the Commission without unnecessary delay, and scheduled a Status Conference in the Litigation to be held December 3, 2003. *Id.* at 7. In response to Plaintiffs’ concern that a referral to the

binding on it), see also *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987)(fact that “minions” of the Secretary of Health and Human Services have taken different views of regulation in question is irrelevant as the view of the Secretary is controlling). To the extent that the letter purports to do so, it is of no force and effect. *Id.* Indeed, the Enforcement Bureau has stated in no uncertain terms that it takes compliance with the Commission’s 911 Rules extremely seriously and, to that end, has requested Petitioners to provide a copy of the studies so that it can determine whether or not there has been a rule violation. See November 22, 2002 letter from David Solomon, Chief of the Commission’s Enforcement Bureau, to Carl Hilliard of WCA, attached hereto as Exhibit G.

¹³ Exhibit A at 7-8.

¹⁴ In the September 3 Order, the Court quoted from portions of the *Second Report and Order* that alternatively stated, sometimes in the same paragraph, that what the 17 Second Rule required was “receipt of the voice signal by the base station” and/or “delivery of the call to the landline carrier.” Since once a cell phone call is received by the base station it is delivered to the landline carrier virtually instantaneously, under the FCC Order these are alternative statements of the same proposition. Although the Court apparently found an ambiguity in this, defendants’ position that a voice channel assignment is all that is required is still clearly incorrect.

Commission might delay the resolution of the Litigation, the Court implied that it anticipated receiving a reasonably prompt response to its questions because the Commission had already commenced an investigation in response to the allegations of non-compliance with the 911 rules asserted in the Litigation September 3 Order at 7.¹⁵

**THE COMMISSION SHOULD ISSUE A DECLARATORY ORDER THAT CONFIRMS
THE CLEAR LANGUAGE OF THE SECOND REPORT AND ORDER**

The Commission should respond to the Court's referral by issuing a declaratory order confirming that the 17 Second Rule requires handsets to switch to a competitor's system whenever a 911 call fails to connect to the landline carrier within 17 seconds. The Commission should tell the Court that "connection to the landline carrier" for purposes of the rule is a state beyond the mere assignment of a voice channel, and that defendants' position that a call is complete when a voice channel is assigned is clearly incorrect. Rather, "connection to the landline carrier" is the state that is reached when the cellphone call is actually connected to the facilities of the local wireline telephone company, so as to enable the call to be connected to the

¹⁵ The Court also observed that Plaintiffs in the Litigation "do not dispute that this litigation affects only a small fraction of wireless 911 calls because of the current dominance of digital technology." September 3 Order at 7. However, the Court has incorrectly characterized both Plaintiffs' position in the Litigation and the number and scope of the wireless calls that continue to be affected by the 17 Second Rule. Contrary to the Court's statement, Plaintiffs/Petitioners believe that the 17 Second Rule affects a *significant* number of cellphone calls and remains critically important to the safety of cellphone users. The growth of digital service in the four years since the *Second Report and Order* was issued in 1999 does not affect that conclusion. Although the number of phones that operate *only* in analog mode has declined during the last four years, the great majority of cellphone handsets now in use are dual mode or multi-mode phones that can operate in *either* digital or analog mode. Network coverage for digital service is not as extensive as the coverage of the analog network. Indeed, the Commission recently found that digital service is currently available to only 71.4% of the land mass of the United States. *Eighth Report and Order in In re Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, WT Docket No. 02-379, FCC No. 03-150, __ F.C.C.R. __ at Appendix D, Table 7, p. D-10 (July 14, 2003). Moreover, the coverage of particular types of digital coverage such as CDMA, TDMA/GSM or iDEN is even more spotty – Commission-prepared maps show large unserved areas for each of those digital methods. *Id.*, __ F.C.C.R., Appendix F, Maps 5-9, at pp. F-6 – F-10. Accordingly, dual mode and multi-mode phones often operate in analog mode where digital coverage is weak. *See, e.g.*, "Quick View: Digital vs. Analog", <http://commerce.motorola.com/consumer/QWhtml/digitalvsanalog.html>. Such areas are precisely the sort of rural areas where "lock in" and other call completion problems are likely to present a particular problem.

PSAP. Once that happens, the danger of "lock-in" is past and the cellphone caller and the PSAP will be able to communicate with each other.

The language of the *Second Report and Order* is absolutely clear and explicit on this point. It states, at ¶41:

[T]he handset should seek to complete the call with the non-preferred cellular carrier if the preferred cellular carrier has not *successfully delivered the call to the landline carrier* within 17 seconds after the call is placed....The 17-second period is generally consistent with the combined time periods for two basic call processing tasks that must be performed and completed if a call attempt is to be successful after the call is sent: in the first task, a handset waits up to 12 seconds to receive a voice channel assignment from a base station; in the second task, the base station waits up to 5 seconds to receive a voice channel transmission from the handset.

The assertion that all that the Commission requires is the *assignment of a voice channel* within 17 seconds is simply not consistent with the language of the *Second Report and Order*. Indeed, the passage quoted above makes clear that the 17 second time period was selected by the Commission in part because 17 seconds is the sum of the time periods typically consumed by two stages of the calling process – 12 seconds for voice channel assignment *plus 5 seconds for the base station to receive an actual voice transmission from the handset*. Therefore, it was clearly the Commission's expectation that the assignment of a voice channel would take not 17 seconds, but no more than 12 seconds. A system that merely achieves voice channel assignment in 17 seconds without attempting to complete the call on a non-preferred carrier's frequencies fails to comply with the 17 Second Rule.

Furthermore, footnote 52 of the *Second Report and Order* states *explicitly* that the 17 Second Rule requires that handsets go beyond the mere assignment of a voice channel. That footnote states, in relevant part:

After a handset receives a voice channel assignment and begins transmission to a base station on that channel, Conversation State is reached. As noted, however, at this stage, the handset's voice channel transmission has not necessarily been received at the base station, and thus the handset may not necessarily be able to use the voice channel to communicate with the base station (and thence to the landline network). In establishing a time limit for delivering the call to the landline carrier, we are seeking to ensure that communication between the handset and base station *goes beyond Conversation State and reaches the point where*

the handset's voice channel transmission is actually received at the base station.

Second Report and Order, n. 52 (emphasis added). In light of this language, it is simply not possible to claim that the only thing that needs to be accomplished in 17 seconds under the Commission's rules is the assignment of a voice channel.

The theory that "call completion" occurs when a voice channel is assigned is equally inconsistent with the language of the *Second Report and Order*. Indeed, the *Second Report and Order*, at ¶36, criticizes the A/B-IR method, as proposed by the cellphone industry, precisely on the grounds that

. the algorithm treats a call as completed when the handset is in what is termed "Conversation State." However, at this stage the handset has not necessarily been connected with the wireless carrier or the 911 PSAP.

The Commission therefore *refused* to allow the industry to adopt the A/B-IR method without conditions or modifications. Instead, it imposed the 17 Second Rule as a *condition* to the approval of the A/B-IR approach. *Id.*, ¶¶39-41.

The suggestions that voice channel assignment is all that must be achieved within 17 seconds, or that a call may be deemed "complete" when a voice channel has been assigned, are not only inconsistent with the *language* of the *Second Report and Order*, but, to an even greater degree, are utterly at odds with the *purpose* of the 17 Second Rule. The rule is designed to combat "lock-in." The *Second Report and Order* is absolutely explicit about that. *Id.* at ¶¶36-41. It is equally undisputed that the "lock-in" problem occurs when a call takes too long to reach the point at which the caller can actually communicate with the PSAP on the other end. ¶16. An interpretation that holds that all that the only thing that needs to be accomplished within 17 seconds is voice channel assignment *would do nothing* to prevent "lock-in." Indeed, it would have done nothing to advance the interests of public safety. Yet, the Commission believed and stated that it expected the 17 Second Rule to "have a significant positive impact on the security and safety of analog cellular subscribers, especially in rural and suburban areas." *Second Report and Order*, ¶1. To interpret that rule in such a way as to have *no* impact on the security and safety of cellphone subscribers would be nonsensical.

CONCLUSION

In responding to the Court's referral, the Commission faces a stark choice: It can confirm and defend the rules it made to protect 911 cellphone callers from harm or it can adopt the clearly incorrect interpretation of those rules proffered by the cellphone industry, an interpretation that not only is completely inconsistent with the language of the *Second Report and Order* but also exposes cellphone users to the very risks which the *Second Report and Order* in general and the 17 Second rule in particular were enacted to guard against. Petitioners submit that there is only one *legitimate* choice for the Commission, and that is to stand staunchly behind the rules it made to protect the public safety. To do otherwise would render the Commission's action meaningless, and allow the industry to defy the Commission with impunity.

The cellphone manufacturers and carriers may tell the Commission that they cannot comply with the rules as written or that compliance would be unreasonably expensive for them. That is categorically untrue. The industry can comply now at reasonable cost and could have done so in 1999 if it had wished to do so. Assuming *arguendo* that the industry could not feasibly have satisfied the 17 Second Rule, it should have told the Commission so when the rules were proposed, instead of reassuring the Commission that it would and could comply with the Rule. The Commission did not make the 17 Second rule in a vacuum – as the *Second Report and Order* makes abundantly clear, it sought, obtained and relied on assurances from the industry that the Rule was workable.

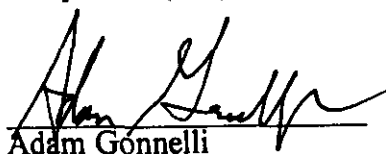
Alternatively, manufacturers and carriers should have sought waivers on the grounds that the Seventeen Second Rule was impossible or too expensive to follow. Such waiver requests, when weighed against the critical public safety issues that the Seventeen Second Rule was designed to protect, might well have been and probably would have been denied – not least because the industry could not have made then, and cannot make now, an honest showing that it is not reasonably capable of complying. But such waiver requests would at least have had the virtue of disclosing to the Commission and the public that they were not complying and did not intend to comply. Instead, the manufacturers and carriers simply elected not to comply and lay

back in the weeds hoping nobody would notice. Such a course of conduct evinces a disrespect for the Commission and a disregard for the safety of the public. We urge the Commission to respond to the Court promptly, and to tell the Court what the *Second Report and Order* so amply confirms – that the 17 Second Rule requires that 911 cellphone calls in analog mode search the frequencies of non-preferred carriers if the call has not been connected to the landline carrier.

Dated: October 3, 2003

Respectfully submitted,

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PROOF OF SERVICE

I am a resident of the State of New York, over the age of eighteen years, and not a party to the within action. My business address is 320 East 39th Street, New York, NY 10016. On October 6, 2003, I served the within documents:

PETITION FOR DECLARATORY RULING

- ☐ by facsimile transmission on that date. This document was transmitted by using a SavinFax 3660 facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (925) 945-8792. The transmission was reported as complete and without error. The names and facsimile numbers of the person served, as shown on the first page of the documents transmitted, are as set forth below.
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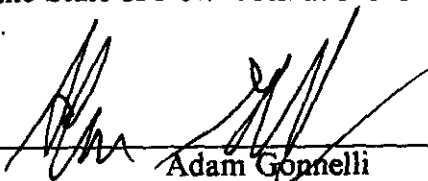
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I declare under penalty of perjury under the laws of the State of New York above is true and correct, executed on October 5, 2003, at New York, NY.


Adam Gonnelli